GANESH RAJA NAGAIAH & ORS v. NR RUBBER INDUSTRIES SDN BHD

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
PRASAD SANDOSHAM ABRAHAM JCA
ASMABI MOHAMAD JCA
[CIVIL APPEAL NO: K-02(NCVC)(W)-608-04-2016]
22 DECEMBER 2016

CIVIL PROCEDURE: *Pleadings – Facts not pleaded – Application for injunction – Whether former manager breached duty of good faith, confidence and fidelity by disclosing confidential information and trade secret – Allegation of – Confidential information or trade secret sought to be protected not pleaded in pleadings – Whether reliefs sought would amount to restraint of trade*

CIVIL PROCEDURE: *Pleadings – Facts not pleaded – Breach of confidence – Application for injunction – Whether former manager breached duty of good faith, confidence and fidelity by disclosing confidential information and trade secret – Allegation of – Whether particulars of breach of confidentiality pleaded – Whether information had necessary quality of confidence – Whether information imparted in circumstances importing obligation of confidence – Whether there was unauthorised use of information detrimental to applicant*

The respondent ('the plaintiff') was carrying out the business of trading natural and synthetic rubber. The first appellant ('the first defendant'), one of the plaintiff's manager, was entrusted with the tasks of managing pricing and forwarding of goods and maintaining the plaintiff's relationship with its customers and suppliers. GPMR Trading was engaged in the same business as the plaintiff. The plaintiff alleged that the first defendant had breached his duty of good faith, confidence and fidelity by using his position to disclose the plaintiff's confidential information and trade secret for his benefit, to the detriment of the plaintiff. At the High Court, the plaintiff sought an injunction against the first defendant and the partners of GPMR Trading, the second and third appellants ('the second and third defendants') relating to restraint of trade. The trial judge instead allowed a claim for breach of confidential information against the first to third plaintiffs. Hence, the present appeal. The defendants submitted that (i) the trial judge failed to appreciate that the details of the confidential information or trade secret sought to be protected was not pleaded; (ii) the relief sought would amount to restraint of trade; and (iii) the list of customers and suppliers were not exclusive to the plaintiff as they were also available in the public domain.

Held (allowing appeal)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) The judgment of the trial judge did not disclose findings on the nature of information which was breached. Failure to identify the nature of information which could be clothed with jurisprudence relating to intellectual property to give protection to the plaintiff was a grave omission by the trial judge. This did not only compromise the integrity of the decision-making process but made the judgment sterile. (para 11)

(2) The trial judge failed to analyse the pleadings and evidence to satisfy the elements of (i) whether the information had the necessary quality of confidence about it; (ii) whether the information has been imparted in circumstances importing an obligation of confidence; and (iii) whether there was unauthorised use of the information detrimental to the plaintiff. (para 12)

(3) The respondent's prayers did not identify the nature of the information for which the respondent sought to seek injunction. In fact, the prayers were oppressive of the second and third defendants. The prayers were too wide and sufficient to impinge with the doctrine of restraint of trade. The trial judge failed to take cognisance of the principles of restraint of trade in His Lordship's judgment. (paras 2 & 16)

(4) The customers, suppliers and forwarders' list together with their contact numbers must be established to be information of confidential nature. Even access to the information in the company must have been limited only to certain persons. General information available to all employees or public could not *per se* attract the doctrine of confidentiality. (para 13)

Bahasa Malaysia *Headnotes*

Responden ('plaintif') menjalankan perniagaan dagangan getah asli dan tiruan. Perayu pertama ('defendan pertama'), salah seorang pengurus plaintif, diamanahkan dengan tugas tinjauan harga, menghantar barang-barang serta mengekalkan hubungan plaintif dengan para pelanggan serta pembekal. GPMR Trading terlibat dalam perniagaan yang sama dengan plaintif. Plaintif mendakwa defendan pertama telah melanggar tugasnya untuk bertindak suci hati, amanah dan setia dengan menggunakan kedudukannya untuk mendedahkan maklumat sulit dan rahsia dagangan plaintif bagi manfaatnya sendiri hingga menjejaskan plaintif. Di Mahkamah Tinggi, plaintif memohon injunksi terhadap defendan pertama dan rakan-rakan kongsi GPMR Trading iaitu perayu kedua dan ketiga ('defendan kedua dan ketiga') bagi sekatan perdagangan. Hakim bicara sebaliknya membenarkan tuntutan bagi pemecahan maklumat sulit terhadap plaintif pertama hingga ketiga. Maka, timbul rayuan ini. Defendan-defendan menghujahkan (i) hakim bicara gagal mempertimbangkan bahawa butiran maklumat atau dagangan rahsia yang ingin dilindungi tidak diplidkan; (ii) relif yang dipohon terangkum bawah

sekatan perdagangan; dan (iii) senarai pelanggan dan pembekal bukan eksklusif buat plaintif sahaja kerana semuanya boleh didapati dalam domain awam.

Diputuskan (membenarkan rayuan)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Penghakiman hakim bicara tidak menyatakan dapatan tentang sifat maklumat yang didedahkan. Kegagalan mengenal pasti sifat maklumat yang mungkin berkaitan jurisprudens harta intelek untuk memberi perlindungan kepada plaintif adalah ketinggalan serius oleh hakim bicara. Ini bukan sahaja menjejaskan integriti proses membuat keputusan tetapi juga menghasilkan penghakiman tandus.

(2) Hakim bicara gagal menganalisis pliding dan keterangan untuk memenuhi elemen-elemen (i) sama ada maklumat tersebut sememangnya bersifat sulit; (ii) sama ada maklumat telah tersebar dalam hal keadaan yang membangkitkan kewajipan amanah; dan (iii) sama ada terdapat penggunaan maklumat yang tidak dibenarkan yang seterusnya menjejaskan plaintif.

(3) Permohonan responden tidak menyatakan sifat maklumat yang ingin dilindunginya melalui permohonan injunksinya. Malah permohonan responden menindaskan defendan kedua dan ketiga. Permohonan-permohonannya terlalu luas dan boleh dicabar oleh doktrin sekatan perniagaan. Hakim bicara gagal mengiktiraf prinsip sekatan perniagaan dalam penghakiman beliau.

(4) Senarai pelanggan, pembekal dan penghantar serta nombor telefon mereka mesti dibuktikan sebagai maklumat sulit. Akses terhadap maklumat dalam syarikat pastinya terhad buat beberapa orang sahaja. Maklumat awam yang tersedia buat semua pekerja atau awam itu sendiri tidak boleh membangkitkan doktrin kerahsiaan.

Case(s) referred to:
Certact Pte Ltd v. Tang Siew Choy & Ors [1991] 3 CLJ 2269; [1991] 4 CLJ (Rep) 716 HC ***(refd)***
China Road & Bridge Corporation & Anor v. DCX Technologies Sdn Bhd [2014] 7 CLJ 644 CA ***(refd)***
Dynast (Melaka) Sdn Bhd & Ors v. Vision Cast Sdn Bhd & Anor [2016] 6 CLJ 176 FC ***(refd)***
Manderson M&F Consulting (A Firm) v. Incitec Pivot Limited [2011] VSC 205 ***(refd)***
Schmidt Scientific Sdn Bhd v. Ong Han Suan & Ors [1998] 1 CLJ 685 HC ***(refd)***

Other source(s) referred to:
Janab's Key To Law Practice and Legal Remedies, pp 316-319

A *For the appellants - Victor Paul Dorai Raj; M/s Burhan & Company*
For the respondent - Chang Chen Choong; M/s Syarikat Ng & Anuar

[Editor's note: For the High Court judgment, please see NR Rubber Industries Sdn Bhd v. Ganesh Raja Nagaiah & Ors [2016] 1 LNS 648 (overruled).]

Reported by Najib Tamby

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JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellants/defendants appealed against the decision of the learned C trial judge who had allowed a claim for breach of confidential information not only against the first appellant who was the former manager of the respondent/plaintiff but also against the second and third appellants who are partners of a business known as GPMR Trading.

[2] What is important to note in this case is that the learned trial judge D failed to make a distinction in relation to prayers related to breach of confidential information and prayers relating to restrain of trade. The prayers of the respondent does not identify the nature of the information which the respondent is seeking an injunction taking into consideration that it is an admitted fact that GPMR Trading is a business which is trading similar E products to that of the respondent. The prayers in fact, are oppressive in nature in particular of the second and third appellants, taking into consideration the pleadings, evidence and the law relating to restraint of trade which warrants the trial court to dismiss the plaintiff's case *at limine*.

[3] The prayers in the statement of claim (which was repeated in the F sealed order) read as follows:

> (a) an injunction to restrain the 1st Defendant from disclosing trade secrets, trade mechanism list of customers/suppliers, contact numbers, method of contacting Plaintiff customers/suppliers, offer price, source and condition of the Plaintiff's (Respondent) products for sale including list G of forwarders and the related cost to third party.
>
> (b) an injunction to restrain the 1st, 2nd & 3rd Defendant (Appellants) trading as GPMR Trading from contacting and soliciting and entering into any transaction in respect of sale and purchase of natural and synthetic rubber with the Plaintiff (Respondent's) customers/suppliers as stated in H Schedule A to the Statement of Claim.
>
> (c) mandatory injunction to compel the 1st, 2nd and 3rd Defendants (Appellants) trading as GPMR Trading to surrender to the Plaintiff (Respondent) all records information with regards to trade secrets, trade mechanism list of customers/suppliers, contact numbers, method of I contacting Plaintiff customers/suppliers, offer price, source and condition of the Plaintiffs (Respondent) products for sale including list of forwarders and the related cost.

(d) all accounts of profit/benefits generated by the 1st, 2nd & 3rd Defendants (Appellant) trading as GPMR Trading to be paid to the Plaintiff (Respondent).

(e) the 1st, 2nd, 3rd Defendants (Appellant) trading as GPMR Trading to forthwith refund to the Plaintiff (Respondent) all commission/payment deposited/received from the forwarders, customers, suppliers agents in the Defendants (Appellants) following accounts since 2012 till the date of the Judgment.

	Bank	Account No	Name of holders
(i)	Public Bank Berhad	4401222614	1st Defendant (Appellant)
(ii)	Public Bank Berhad	3176262205 (Appellant)	2nd Defendant
(iii)	Maybank Berhad	558088425472	GPMR Trading
(iv)	Maybank Berhad	502111300218	1st Defendant (Appellant)

(f) General damages to be assessed.

(g) Cost of RM10,000.00.

[4] The lengthy memorandum of appeal of the appellants, *inter alia,* reads as follows:

1. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila membenarkan tuntutan Responden terhadap Perayu-Perayu.

2. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila memutuskan bahawa Responden telah membuktikan kausa tindakan terhadap Perayu-Perayu.

3. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila memutuskan bahawa cara operasi/mekanisme perniagaan ('trading') Responden cara hubungan pelanggan dan pembekal Responden wajar diperlindungi melalui injunksi sedangkan ianya adalah merupakan sebahagian daripada "own-skill knowledge and business experience" iaitu "know how" yang diperoleh Perayu Pertama sepanjang kerjanya.

4. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mengambil kira bahawa tidak terdapat bukti yang menunjukkan Perayu-Perayu telah mendedah, membongkar dan menyebar rahsia perniagaan, maklumat-maklumat/data-data sulit Responden, cara operasi/mekanisme perniagaan ('trading') Responden, senarai nama pelanggan/pembekal Responden, nombor telefon/cara hubungan pelanggan dan pembekal Responden, sebutan dan tawaran harga barang jual-beli Responden, sumber dan keadaan produk jual-beli

Responden, senarai ejen penghantaran dan kos-kos terlibat kepada mana-mana pihak ketiga pada masa Perayu Pertama bekerja dengan Responden dan/atau selepas Perayu Pertama berhenti kerja dengan Responden.

5. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mengambil kira bahawa Responden telah mengesahkan bahawa Perayu Pertama telah padamkan semua maklumat sulit Responden.

6. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang bahawa Responden gagal membuktikan senarai ejen penghantaran Responden dan/atau ejen-ejen penghantaran tersebut adalah sulit (confidential) atau eksklusif kepada Responden.

7. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila memberi injunksi untuk menghalang Perayu-Perayu daripada berhubung, berurusniaga, pujuk rayu ('solicit') menjalankan apa-apa transaksi jual/beli getah-getah tulen serta barangan-barangan getah sintetik dengan pelanggan-pelanggan dan pembekal Responden sepertimana yang tersenarai dalam Jadual A yang dilampirkan dengan Penyata Tuntutan sedangkan Jadual A tidak dikemukakan dan ditandakan sebagai ekshibit dan justeru itu tidak boleh diterima sebagai keterangan.

8. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mengambil kira bahawa beban untuk membuktikan pelanggan/pembekal seperti di dalam Jadual A adalah pelanggan/pembekal Responden adalah diatas bahu Responden.

9. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mengambil kira bahawa Responden gagal membuktikan bahawa kesemua dan atau nama-nama pihak adalah dalam senarai Jadual A adalah pelanggan/pembekal Responden.

10. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mengambil kira bahawa tidak seorang jua daripada penama di dalam Lampiran A telah dipanggil untuk membuktikan bahawa mereka adalah pelanggan/pembekal Responden.

11. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mengambil kira bahawa Responden gagal membuktikan bahawa senarai pelanggan/pembekal seperti di dalam Jadual A adalah pelanggan/pembekal sulit ("confidential") atau eksklusif pada Responden sahaja.

12. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mengambil kira bahawa jenis perniagaan Responden bukan eksklusif kepada Responden sahaja dan oleh yang demikian senarai pelanggan/pembekal di dalam Jadual A bebas berurusniaga dengan sesiapa sahaja yang dapat memberi perkhidmatan/harga yang baik atau lebih baik.

13. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mengambil kira bahawa Responden tidak dapat membuktikan prestasi perniagaan Responden mengalami kemerosotan yang ketara dan jika ada ianya disebabkan oleh tindakan Perayu-Perayu. A

14. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mengambilkira samada kemerosotan perniagaan Responden disebabkan oleh kegiatan isteri Responden. B

15. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mempertimbangkan fakta bahawa Responden telah gagal membuktikan secara khusus perkembangan pesat perniagaan GPMR Trading adalah atas kerugian kepada Responden (at the expense of the Respondent). C

16. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mengambil kira Responden tidak berhak kepada akaun-akaun Perayu-Perayu dan/atau akaun keuntungan Perayu-Perayu. D

17. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mengambil kira samada pembayaran/komisen adalah sebahagian daripada urusan perniagaan Syarikat Responden.

18. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mengambil kira samada dan bagaimana komisyen yang diambil oleh Perayu-Perayu telah menyebabkan sebarang kerugian kepada Responden. E

19. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mengambil kira bahawa Perayu Pertama telah membayar Responden lebih daripada jumlah komisyen yang diterima oleh Perayu-Perayu. F

20. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mengambil kira bahawa Responden tidak berhak kepada sebarang bayaran komisyen yang diterima daripada ejen pengangkutan, pelanggan-pelanggan dan pembekal-pembekal khususnya selepas tarikh Perayu Pertama telah meletakan jawatan di Syarikat Responden iaitu 31-01-2014 dan/atau selepas GPMR Trading telah bermula perniagaan menjual/membeli getah-getah tulen serta barangan sintetik iaitu bulan Mac 2014. G

21. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mempertimbangkan bahawa Responden gagal menghitungkan apakah jumlah sebenar komisyen yang dikatakan diterima oleh Perayu-Perayu dan/atau kerugian Responden walaupun akaun-akaun Perayu-Perayu telah dikemukakan kepada Responden. H

22. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mengambil kira bahawa tidak terdapat apa-apa asas untuk ditaksirkan ganti rugi am. I

A 23. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mengambil kira bahawa tidak terdapat apa-apa halangan dari segi fakta atau undang-undang yang menghalang Perayu-Perayu daripada menjalankan perniagaan yang serupa dengan Responden.

B 24. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mengambil kira bahawa Perintah Injunksi kekal melanggar peruntukkan Seksyen 28 Akta Kontrak 1950.

25. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mengambil kira bahawa tidak ada apa-apa asas untuk memberi injunksi kekal (final/perpetual injunction).

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26. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila memberi Perintah injuksi yang terlalu luas dan tidak dapat dikuatkuasakan.

27. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mengambil kira bahawa surat pengakuan ekshibit P5 telah diperoleh bukan secara sukarela.

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28. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mengambil kira bahawa terdapat ketinggalan (omission) di dalam pengakuan Perayu Pertama iaitu jumlah wang yang telah dipersetujui yang perlu dibayar kepada Responden sebagai penyelesaian penuh dan muktamad tuntutan Responden.

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29. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mengambil kira bahawa surat pengakuan Perayu Pertama adalah tidak jelas dan terdapat ketinggalan penting.

F 30. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mengambil kira bahawa dokumen yang ditandakan sebagai IDDI9 dan IDD29 (a) - (d) sepatutnya ditandakan sebagai ekshibit.

31. Yang Arif Hakim yang bijaksana telah khilaf dari segi fakta dan undang-undang apabila gagal mengambil kira bahawa "service condition" tidak merupakan sebahagian daripada surat perlantikan Perayu Pertama.

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Jurisprudence Relating To Pleadings, Equitable Relief And Confidential Information

[5] The rules of pleadings as well as proof play an important part in dealing with cases related to confidential information. The concepts and principles appear to be uniform in common law jurisdictions. It is the requirement that the pleadings must clearly identify the information alleged to have been imparted in confidence and to have been misused by the defendant to secure an equitable remedy such as injunction, accounts, etc. If the pleadings only identify a generic breach of an agreement, then at the most the relief may be damages for breach of contract. In such cases, damages must be proved. The distinction must be kept in mind when the plaintiff attempts

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to seek equitable relief and not damages only for contractual breach of employment terms and/or fiduciary duty of directors, etc. The distinction in this area of jurisprudence is not one of an apple and an orange but that of marble and pumpkin. In *Manderson M&F Consulting (A Firm) v. Incitec Pivot Limited* [2011] VSC 205, the Australian Court dealt with the pleading rules related to confidential information. Croft J's judgment on this issue as summarised by Des Ryan of Davies Collision Cave, *inter alia,* reads as follows:

> (a) "the absolutely critical element in the pleading of a claim of this kind is the identification or definition in specific; and not merely general, global terms, or on some inferential basis, of that which it is said to be the confidential information in question."
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> (b) "As I have indicated the case is to be approached in terms of the general law, not as a case of confidence protected by contract, but as one, if anything of confidence protected in equity. It is now settled that in order to make out a case for protection in equity of allegedly confidential information, a plaintiff must satisfy certain criteria. The plaintiff: (i) must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question; and must also be able to show that (ii) the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge); (iii) the information was received by the defendant in such circumstances as to import an obligation of confidence; and (iv) there is actual or threatened misuse of that information …".

[6] When equitable relief as opposed to contractual reliefs are sought, the threshold for the former is high. Those who seek equitable relief must come with clean hands and the reliefs sought must not be seen to be oppressive or for collateral purpose or more than necessary to meet with the exigencies and/or factual matrix of the case. (See *Janab's Key To Law Practice and Legal Remedies,* pp. 316 to 319). The pleadings, evidence and the prayers will stand as a focal point to grant the relevant prayers. Lack of judicial appreciation of the pleading rules, evidence as well as the jurisprudence relating to equitable prayers in the grounds of judgment in almost all cases may warrant appellate intervention.

[7] It is well settled that the courts whether in contractual or equitable claim relating to confidential information places much emphasis on the nature of information as well as its breach. Support for the above propositions is found in a number of cases, to name a few are as follows:

(a) In *China Road & Bridge Corporation & Anor v. DCX Technologies Sdn Bhd* [2014] 7 CLJ 644; [2014] 5 MLJ 1, the Court of Appeal had this to say:

> [23] The learned counsel for the first defendant's argument that the information released does not breach the obligation of confidence and does not fall within the parameters of confidential information as envisaged by the parties in cl 7.1 of

A the 'memorandum' has merits. Very importantly in the instant case the identification of the 'confidential information' or for that matter 'information' has not been met (see *John Zink Co Ltd v. Wilkinson and Another* 3 [1973] FSR 1). On the issue of confidential information there are a number of authorities to support the first defendant's argument. To name a few are as follows:

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(a) In *Coco v. AN Clark (Engineers) Limited* [1968] FSR 415 where it was stated:

> In cases of contract, the primary question is no doubt that of construing the contract and any terms implied in it. Where there is no contract, however, the question must be one of what it is that suffices to bring the obligation into being; and there is the further question of what amounts to a breach of that obligation.
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> In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, MR in the *Saltman*'s case on p 215, must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communication it. I must briefly examine each of these requirements in turn.

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(b) The Federal Court, in the case of *Dynast (Melaka) Sdn Bhd & Ors v. Vision Cast Sdn Bhd & Anor* [2016] 6 CLJ 176 had held:

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> (2) While it was true that the plaintiffs' claim was only to enforce the contractual clauses related to confidential information entered and agreed upon by the second defendant, it was not sufficient to merely state in the statement of claim that the second defendant had 'misappropriated the private and confidential information of the plaintiffs.' Surely more particulars should have been given on the alleged misappropriated private and confidential information. The second defendant was entitled to know what was the private and confidential information alleged to have been misappropriated by him. It would then allow him to contest the claim of privacy and confidentiality of those information. After all, information will only be protected if it could properly be classed as a trade secret or as material which, while not properly to be described as a trade secret, is in all the circumstances of such a highly confidential nature as to require the same protection as a trade secret *eo nomine*. In the circumstances, there was no breach of fiduciary duty or even a breach of confidentiality by the second defendant in this case.

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Brief Facts

[8] It is essential to note that in the judgment, the learned trial judge had referred to the first appellant as a director when he was only a manager. This error in relation to the concepts of fiduciary breach is sufficiently material to compromise the decision-making process. The duty and responsibility of the director and the manager is not one and the same in relation to breach of confidential information and/or fiduciary duty. We do not think it is necessary for us to deliberate on this issue in this judgment.

[9] The facts can be summarised as follows:

1. The plaintiff was at all material times carrying out the business of trading natural and synthetic rubber.
2. The 1st defendant was one of the plaintiff's manager from 1999-2014.
3. The 1st defendant during his tenure was entrusted with the task of managing and maintaining the plaintiff's relationship with its customers and suppliers. The 1st defendant was also tasked to manage the pricing and forwarding of goods.
4. GPMR Trading was established sometime in December 2012 and the 2nd and 3rd defendants were partners in GPMR Trading.
5. GPMR Trading was engaged in the same business as the plaintiff since March 2014 until a few months after the determination of the 1st defendant's employment.
6. The plaintiff alleged that the 1st defendant had breached his duty of good faith, confidence and fidelity by using his position, the plaintiff's confidential information and the plaintiff's trade secret for his own benefit to the detriment of the plaintiff to which the 1st defendant denied.

[10] Learned counsel for the appellant, *inter alia,* anchors the complaint as follows:

2.3 The Learned Trial Judge failed to appreciate that details or particulars of the confidential information or trade secret sought to be protected was not pleaded and is too wide for any relief to be granted.

2.4 The relief sought would amount to restrain of trade.

2.5 The Plaintiff admitted that the list of customers and suppliers is also available in the public domain. This was not considered by the Learned Trial Judge and this is a fundamental error.

2.6 The Learned Trial Judge failed to appreciate that the Plaintiff's customers and suppliers are not exclusive to the Plaintiff nor does the Plaintiff have a proprietary right to it.

[11] We have read the appeal record and the submission of the parties. After much consideration to the submission of counsel for the respondent, we took the view that the appeal must be allowed. Our reasons, *inter alia,* are as follows:

(a) We have checked the pleadings several times to ascertain the nature of information which the respondent claims was breached. We have also checked the judgment of the learned trial judge to ascertain his finding as to the nature of information which was breached. There was none. Failure to identify the nature of information which can be clothed with the jurisprudence relating to intellectual property to give protection to the plaintiff is a grave omission by the learned trial judge which not only compromises the integrity of the decision-making process but also on the face of record makes the judgment sterile.

(b) The learned trial judge's deliberation on the confidential information was generic in nature and makes an abrupt conclusion that the information was confidential in nature, in reliance of two cases, namely: (i) *Schmidt Scientific Sdn Bhd v. Ong Han Suan & Ors* [1998] 1 CLJ 685; [1997] 5 MLJ 632; (ii) *Certact Pte Ltd v. Tang Siew Choy & Ors* [1991] 3 CLJ 2269; [1991] 4 CLJ (Rep) 716. The relevant part of the judgment reads as follows:

> 14. In the present case, the information that the Plaintiff sought to restrain the First Defendant from using or disclosing to third parties were the Plaintiff's trade secret inclusive of the Plaintiff's trading, the Plaintiff's customers, suppliers and forwarders list together with their contact numbers, and price quotation and cost of goods.
>
> 15. The Defendants maintained that the customers' information could be easily accessed online through the Ministry of International Trade and Industry's ("MITI") websites and other websites for that matter.
>
> However, there was not a shred of evidence produced to support the Defendants' contention.
>
> 16. In addition, the Defendants did not rebut the evidence of SP1 who gave evidence that the customers list was built by SP1 since 20 years ago and the list was saved, compiled and updated from time to time. In fact, SD1 himself confirmed that the list was a collection of information compiled throughout the plaintiff's business.
>
> 17. I am of the view that such information is confidential in nature.

[12] The learned trial judge had failed to take a curial analysis of the pleadings and evidence to satisfy whether the three elements stated in *Coco*'s case had been established by the plaintiff. That is to say:

(a) whether the information have the necessary quality of confidence about it;

(b) whether the information have been imparted in circumstances importing an obligation of confidence;

(c) whether there was unauthorised use of the information detrimental to the plaintiff.

The three elements which were explained in *Coco*'s case had been expanded in a number of cases in Malaysia as well as other jurisdiction more so when equitable reliefs are sought.

[13] It must be noted that the learned trial judge takes note that the 'price quotation and costs of goods' as confidential information. Price quotation and costs of goods cannot be relevant when the first appellant is no more an employee of the respondent and the acts complaint of are not related to breach during his time of employment. In the ordinary course of business the price of goods related to rubber will not be static. In addition, the customers, suppliers and forwarders list together with the contact numbers must be established to be information of confidential nature. That is to say, even access to the information in the company must have been limited only to certain persons, etc. General information available to all employees or public, etc.; cannot *per se* attract the doctrine of confidentiality.

[14] The learned trial judge has anchored his judgment on the grounds that the first appellant was one of the directors from 1994 until 2014 when in fact the first appellant was only a manager. Such an error is fatal and will compromise the integrity of the decision making process. The error in this case from the reading of judgment is not a typo error. It is factual. That part of the judgment reads as follows:

> [25] It was an undisputed fact that the First Defendant was one of the Plaintiff's directors from 1999 until 2014. It was also not disputed that as one of the Plaintiff's directors, the First Defendant was entrusted with the task of managing and maintaining the Plaintiff's relationship with its customers and suppliers. The First Defendant was also tasked to manage the pricing and forwarding of goods. Most of the First Defendant's communications with the Plaintiff's customers and suppliers were conducted *via* the internet and emails. The First Defendant was given access to the Plaintiff's official emails in carrying out his duties. It was also admitted by the SD-1 himself that the customers list were accessible only by the directors and not by the public. The information was made available to the First Defendant by virtue of his position as one of the Plaintiff's directors and in the course of him carrying out his duties.
>
> [26] However, as regards to this issue, the Defendants contended that there were no contractual evidence to show that the First Defendant owed any such duties to the Plaintiff either during the First Defendant's employment or after the First Defendant had stopped working with the Plaintiff.

A [27] I find that this contention is baseless. Authorities are clear that firstly, the obligation of confidence may emanate from the relationship of the parties even in the absence of any agreement on that subject.

[28] In *Electro Cad Australia Pty Ltd & Ors v. Mejati RCS Sdn Bhd & Ors (supra)* Kamalanathan Ratnam J (as he then was) held at p. 440 the following:

B It is my judgment that *even in the absence of an agreement, the first and second defendants owe an equitable obligation to the second plaintiff in relation to confidential information they received in their capacities as consultant and director respectively*. Lai was privy to all, if not most, of the confidential information by virtue of his position as the director (technical head) of the second plaintiff. The said information was used by the first defendant and the
C second defendant in the design and manufacture of the 'Stopcar' product and also by Lai with the third and fourth defendants in the marketing and the promotion of the 'Stopcar' product I therefore find that such use by the first and second defendants amount to a breach of confidential information: (emphasis added).

D **[15]** The learned trial judge's reliance of a number of cases was done out of context without proper appreciation of legal principles to the facts of the case as well as decisions of Court of Appeal and the Federal Court in this area of law. Those cases can be distinguished from the facts of this case and we do not think judicial time ought to be spent to make the distinction.

E **[16]** In the instant case, we also agree with the appellant's contention that the prayers are too wide and sufficient to impinge with the doctrine of restraint of trade and that the learned trial judge failed to take cognisance of the principles of restraint of trade in the judgment.

F **[17]** For reasons stated above, we take the view that the appeal must be allowed and the decision of the High Court must be set aside with costs. The respondent was ordered to pay costs of RM10,000 here and below subject to allocatur. Deposit was ordered to be refunded.

We hereby ordered so.

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